



STATE OF NEW YORK

UNEMPLOYMENT INSURANCE APPEAL BOARD

PO Box 15126

Albany NY 12212-5126

DECISION OF THE BOARD

Mailed and Filed: JANUARY 30, 2023

IN THE MATTER OF:

Appeal Board No. 626452

PRESENT: MARILYN P. O'MARA, MEMBER

The Department of Labor issued the initial determination disqualifying the claimant from receiving benefits, effective June 20, 2022, on the basis that the claimant lost employment through misconduct in connection with that employment and holding that the wages paid to the claimant by prior to June 20, 2022, cannot be used toward the establishment of a claim for benefits. The claimant requested a hearing.

The Administrative Law Judge held telephone conference hearings at which testimony was taken. There were appearances by the claimant and on behalf of the employer. By decision filed September 15, 2022 (A.L.J. Case No.), the Administrative Law Judge overruled the initial determination.

The employer appealed the Judge's decision to the Appeal Board.

Based on the record and testimony in this case, the Board makes the following

FINDINGS OF FACT: The claimant worked for the employer's restaurant/bar as a full-time bar manager from March 16, 2019 until June 18, 2022. The employer was made aware that the claimant was drinking a great deal of WC, an alcoholic beverage, and decided to watch surveillance video of her working on June 15, 2022. When they did, they witnessed her drinking various beverages, including WC. Based on this, the employer decided to take an inventory of WC over three days, June 15 through 17, and to then compare that inventory to how many cans of WC were recorded as sold on those same three days. The employer found that the inventory of WC for those three days went down by about seven cans each day. However, the recorded sales of WC over those same three days showed that

a total of only four cans were sold. The employer then compared inventory and sales for the year and a half that the claimant had worked and found a large quantity of cans of WC were unaccounted for.

Since the claimant drank WC routinely, she purchased the beverage from an outside retailer and brought some cans to work with her for her own consumption. However, in addition to the cans she purchased, she also drank cans of WC from the employer's inventory without paying for them. When the employer confronted the claimant about drinking cans of WC from the employer's inventory without paying for them, the claimant began to cry and told the employer that she was sorry. The claimant was discharged for the theft of WC from the employer's inventory.

OPINION: The credible evidence establishes that the claimant was discharged for consuming cans of an alcoholic beverage from the employer's inventory without paying for them. Although the claimant and the employer disagreed over the number of cans the claimant consumed without paying for them, the claimant conceded that that she drank cans of WC from the employer's inventory without paying for them in addition to drinking the cans she had purchased on her own. Moreover, although the claimant contended that she did not know that she was doing anything wrong since the employer had not prohibited her from drinking alcoholic beverages while at work, the claimant's own testimony establishes that she knew she was breaking the employer's rules. Given the claimant's testimony and concessions, we conclude that the claimant knew that she was not entitled to drink cans of this alcoholic beverage without paying for same and that her conduct constitutes theft from the employer. It is well-settled that theft of merchandise from an employer, regardless of the value, is misconduct (see, *Matter of Jordan E. Tracy*, 145 AD3d 1218 [AD 3d Dept 2016], *aff'ing* Appeal Board No. 590989 A). As the claimant admitted to drinking at least some of the employer's inventory without payment or permission, the amount of her consumption is immaterial. Accordingly, we conclude that the claimant's conduct constitutes misconduct for Unemployment Insurance purposes.

DECISION: The decision of the Administrative Law Judge is reversed.

The initial determination, disqualifying the claimant from receiving benefits, effective June 20, 2022, on the basis that the claimant lost employment through misconduct in connection with that employment and holding that the wages paid to the claimant by prior to June 20, 2022 cannot

be used toward the establishment of a claim for benefits, is sustained.

The claimant is denied benefits with respect to the issues decided herein.

MARILYN P. O'MARA, MEMBER